

2003 JUN 18 A 11:43

FMCSA

V.

SCHALLER TRUCKING, INC.

DOCKET NO: FMCSA-2000-7383-8
(Formerly WI-97-004-US0430)

Honorable Burton S. Kolko

**MOTION
TO CANCEL HEARING**

NOW COMES the Field Administrator for the Federal Motor Carrier Safety Administration, Midwest Service Center, by and through his Counsel who moves the Administrative Law Judge ("ALJ") for an order canceling the hearing in the above captioned matter by reason of Schaller Trucking's default on the original Notice of Claim. In support of his motion the Field Administrator states as follows:

I. INTRODUCTION

1. On June 6, 2003, the Field Administrator filed with the court his pleading and argument entitled Agency Motion to Reject or Otherwise Deny the Petition for Reconsideration. **Said motion and argument are incorporated by reference as though fully restated hereinbelow.**
2. On June 12, 2003, the Administrative Law Judge ruled upon the Field Administrator's June 6, 2003 motion and in doing so understood the Field Administrator's purpose as seeking

"clarification regarding the status of the Notice of Claim." (In fact, the purpose for the Field Administrator's Motion was to demonstrate that the carrier had originally defaulted, and this case was mistakenly assigned for hearing.) The net result of the ALJ's order was to re-affirm the hearing scheduled for July 31, 2003.

3. The ultimate purpose for this short motion and argument is to reiterate what has already been demonstrated. There is no basis under the FMCSA Rules of Practice for conducting any hearing. Schaller Trucking **defaulted** on the original Notice of Claim - long before the Chief Safety Officer ("CSO") mistakenly assigned the NOC for hearing. This senior fact clearly escaped the notice of the CSO due in no small part to the complete paucity of documentation in the record before the CSO. Indeed, the Record consisted solely of Schaller's April 25, 2000 letter/petition for reconsideration. The CSO was unaware of Schaller's default, and he was fully unaware of anything that followed.

II. ARGUMENT

The Argument in a Nutshell...

(Continuing reference is made to the Field Administrator's motion and argument served on June 6, 2003.)

A. Schaller Had Already Defaulted. There Was No Case to Assign for Hearing and There is No Case to Adjudicate

The Field Administrator served a Notice of Claim to Schaller Trucking ("Schaller") on November 15, 1996. The Notice of Claim notified Schaller that failure to timely Reply would

result in a default, and the Notice of Claim would become the Final Agency Order in the proceeding 25 days after service of the Notice of Claim. 49 CFR §386.14(e) Schaller did not Reply. After failed efforts to settle the case, the Field Administrator served Schaller with a Notice of Final Agency Order on March 29, 2000 wherein Schaller was told that it had defaulted, and that it could seek reconsideration within 20 days. Schaller's April 25, 2000 letter and request that the Chief Safety Officer "reconsider this matter" was served 2 days late. The Field Administrator gave Schaller the benefit of the doubt and opted to treat its letter as a Petition for Reconsideration. The Petition should have been rejected.¹ Thus, the Notice of Claim was and continued to be the Final Agency Order - all because of Schaller's default. Further, the Notice of Claim was still the Final Agency Order when the CSO misunderstood the status of the case and referred these proceedings for hearing. Because there had been a default, there was nothing to assign for hearing. This case has already been disposed of.

B. Even if the Petition for Reconsideration Had Been Timely, it Still Should Have Been Denied by the CSO. There Remains No Case to Adjudicate

The Field Administrator again states for the record that Schaller **defaulted** on the original Notice of Claim. Schaller subsequently lost any chance for "reconsideration" when it failed to timely serve its Petition for Reconsideration. Even ignoring the latter defect, the result would not have changed. When a respondent defaults on the Notice of Claim, the only issue on a *successfully* served Petition for Reconsideration is whether the respondent defaulted in the first

¹ If the Field Administrator has been too generous in his depiction of the letter as a petition for reconsideration, then this argument can be cut short. There was a default...period! Simply put, this case was mistakenly assigned for hearing. There is nothing left to argue.

place. In The Matter of Kent Ness dba Ness Harvesting (Docket No. FMCSA-2000-8111, Order denying Petitions for reconsideration, March 15, 2002. We know the answer to this inquiry. Schaller did default on the Notice of Claim, and it submitted no evidence with its petition that demonstrated otherwise. In fact, Schaller submitted no evidence at all. Were the ALJ (and the CSO before him) to ignore - for some inexplicable reason - the Ness Harvesting decision, even a *timely* filed Petition for Reconsideration submitted by Schaller would still have to be denied. Under pre-Ness Harvesting case law a respondent who defaulted on the Notice of Claim could still challenge the penalty. Even under this earlier scenario Schaller would have been required to submit to the CSO with its April 25, 2000 Petition for Reconsideration evidence demonstrating that the fine was too high or miscalculated or that the fine should have been lowered because the carrier came into compliance between the time of the Compliance Review and the issuance of the Notice of Claim. In addition, the evidence must have been supported by declaration or affidavit (49 CFR §386.49).² Clearly, Schaller did not comply with even the relaxed evidentiary and procedural requirements that existed before Ness Harvesting. The reason is quite simple. The fine was properly calculated. The fine was not excessive. Schaller did not come into compliance prior to the issuance of the Notice of Claim. Declaration of Lynda Dolan (Exhibit A to the Field Administrator's June 6, 2003 Motion and Argument.)

Thus, even if we ignore the fact that Schaller did not *timely* file its April 25, 2000 Petition for Reconsideration, the result under **Section A.**, above would remain unchanged. Had the record been fully developed before the CSO, and had he been fully informed by Schaller of the

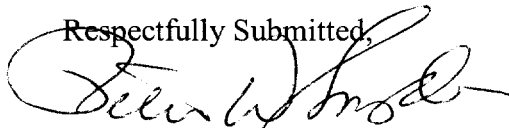
² In the Matter of Bergerson-Caswell, Inc., Docket No. OMCS-99-6497, Order, November 24, 1999

procedural posture of this case, the petition would have been denied. The Notice of Claim would have remained in tact as the Final Agency Order in this matter.

III.
CONCLUSION

WHEREFORE, the Field Administrator respectfully moves the Administrative Law Judge to cancel the hearing currently scheduled for July 31, 2003 for the reasons stated hereinabove and as previously stated in the Field Administrator's prior Motion of June 6, 2003.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Peter W. Snyder", written over the typed name.

Peter W. Snyder

Senior Enforcement Counsel

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CERTIFICATE OF SERVICE

This is to certify that on this 13th day of June, 2003, the undersigned delivered the designated number of copies of the forgoing document to the persons listed below.

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One Copy
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Washington, D.C. 20590

U.S. Mail

The Honorable Burton S. Kolko
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Office of Hearings, M-20, Room 5411
U.S. Department of Transportation
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Hand Delivered

Dated: June 13, 2003

